# Wu Sor Hwa & Ors v Dato' Seri Dr Abdullah Fadzil Che Wan & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-352–10 OF 2016
AZIZUL AZMI ADNAN J
28 JUNE 2019

*Contract — Shareholders' agreements — Construction — Enforcement of buy-out clause — Plaintiffs and defendants entered into shareholders agreement — Application by plaintiffs to enforce buy-out clause in shareholders' agreement — Whether signatures of third and fourth defendants in shareholders' agreement had been forged — Whether there was misrepresentation by plaintiff — Whether satisfactory completion of corporate exercises were conditions precedent to enforceability of shareholders' agreement — Whether there was privity of contract between first to fourth defendants and second plaintiff — Whether defendants breached shareholders' agreement by disposing property of subsidiary company without plaintiffs' knowledge and consent — Whether share swap constituted breach of shareholders' agreement — Whether buy-out clause was 'stipulation by way of penalty' — Contracts Act 1950 ss 19(1), 24 & 75*

The first and the third plaintiffs had entered into a shareholders' agreement ('the shareholders' agreement') with the first to fourth defendants to govern their relationship in a joint venture company ('the company'). It ought to be noted that Pesona Metro Sdn Bhd had also executed the shareholders' agreement but their shares in the company were subsequently transferred to the second plaintiff. The plaintiffs in the present case contended that the defendants had breached the shareholders' agreement by: (a) disposing of a property held by a subsidiary of the company without the plaintiffs' knowledge; (b) allotting shares in the company as consideration for the purchase of the entire share capital of two companies known as Swiftlet Eco Park Bhd and Royal Birds Nest Sdn Bhd; (c) causing a subsidiary of the company to engage in the dealing and offering of redeemable convertible preference shares of the sixth defendant without the plaintiffs' knowledge; and (d) transferring the shares in the company held by the first to fourth defendants to the sixth defendant without the plaintiffs' consent and in breach of the rights of first refusal provided for under the shareholders' agreement. These breaches entitled the plaintiffs to enforce a buy-out clause contained in the shareholders' agreement. The defendants challenged the enforceability of the shareholders' agreement and submitted that: (i) the signatures of the third and fourth defendants on the shareholders' agreement had been forged; (ii) the third plaintiff had misrepresented to the first and second defendants that the third plaintiff, through one Dato' Sri To Kam Foo, would procure that certain

corporate exercises would be carried out in connection with the shares in the company ('the representations'); (iii) satisfactory completion of the corporate exercises were conditions precedent to the enforceability of the shareholders' agreement; and (iv) there was no privity between the first to fourth defendants and the second plaintiff. The first and second defendants also counterclaimed that the plaintiffs had breached the share sale agreements that had been entered into between the plaintiffs and the first and second defendants, which specified the satisfactory completion of certain corporate exercises as a condition precedent.

**Held**, allowing the plaintiffs' claim with costs, and dismissing the defendants' counterclaim:

(1) On 9 September 2015, the company secretary in a reply email to the first plaintiff, which email was copied to the third and fourth defendants, had gave detailed advice on the quorum requirements under the shareholders' agreement, nevertheless, there was no response by the third and fourth defendants questioning the shareholders agreement. Similarly, on 26 February 2016, vide a letter to the board of directors of the company, the first plaintiff had made a specific reference to the shareholders agreement but there was no response by the third and fourth defendants. It was only on 7 June 2016 that the contention of forgery was raised by the defendants. Based on the undisputed contemporaneous documentary evidence, the allegation of forgery had not been made out and was no more than mere afterthought (see paras 11, 17–20 & 22).

(2) As a matter of law, the representations purportedly made by the third plaintiff, could not have had legal effect because of an entire agreement clause contained in the shareholders' agreement. Further, an examination of the shareholders' agreement would reveal that the satisfactory completion of the corporate exercises was not conditions precedent to the enforceability of the shareholders' agreement. Even though there was such a condition precedent in the share sale agreements by which the plaintiffs acquired their shares in the company, the inescapable conclusion was that compliance with this condition precedent had been waived, for it was not in dispute that the share sale agreements had proceeded to completion (see paras 11, 26 & 35).

(3) The letter of 22 August 2011 by which the second plaintiff undertook to be bound by the terms of the shareholders' agreement was sufficient to create privity between the second plaintiff and the first to fourth defendants once that letter was received by the first to fourth defendants. Under cl 6.4 of the shareholders' agreement, the parties to the shareholders' agreement had agreed that, once a transferor of shares in the company had done a particular thing (in this case executed a deed of adherence and accession by which it agreed to be bound by the

shareholders' agreement), then that transferor would be 'entitled to the benefit' of the shareholders' agreement. There was no requirement for all the shareholders to execute the same piece of paper for them to be bound on the terms of the shareholders' agreement (see paras 11 & 47–49).

(4) The board meeting of 26 August 2015 had effectively resolved to approve the acquisition by the company of shares in Swiflet Eco Park Bhd and Royal Bird's Nest Sdn Bhd, nevertheless, the special quorum requirements specified in the shareholders' agreement for board meetings to approve transactions of this nature had not been complied with by the defendants. There was thus a breach by the first to fourth defendants of their obligations under the shareholders' agreement (see paras 50 & 54).

(5) The transfer of the shares in the company by Pesona Metro Sdn Bhd to the second plaintiff and the subsequent undertaking by the second plaintiff to be bound by the terms of the shareholders' agreement resulted in the second plaintiff being substituted for Pesona Metro Sdn Bhd as though it were a party to the shareholders' agreement in place of Persona Metro Sdn Bhd. Such being the case, there was no question of the first to fourth defendants being relieved of their obligation to obtain the written consent of the second and third plaintiffs under cl 6.1 of the shareholders' agreement, or of their obligation to comply with the second and third plaintiff's rights of first refusal under cl 6.2. Thus, there had been a breach by the first to fourth defendants of their obligations under the shareholders' agreement in this regard (see paras 50 & 71–72).

(6) It was not in material dispute that the company had negative net tangible assets ('NTA') as at 31 December 2016. As the NTA per share of the company was a negative number, the plaintiffs were entitled to acquire the shares held by the first to fourth defendants in the company for the consideration of RM1. Further, based on the express intention of the parties as set out in cl 12.2 of the shareholders' agreement, the buy-out clause in this case would be a primary obligation of the first to fourth defendants and thus would not be a 'stipulation by way of penalty' for the purposes of s 75 of the Contracts Act 1950 (see paras 78–79 & 89).

**[Bahasa Malaysia summary**

Plaintif pertama dan ketiga telah memasuki perjanjian pemegang saham ('perjanjian pemegang saham') dengan defendan pertama hingga keempat untuk mengatur hubungan mereka dalam syarikat usaha sama ('syarikat'). Harus diingat bahawa Pesona Metro Sdn Bhd juga telah memasuki perjanjian pemegang saham tetapi saham mereka dalam syarikat tersebut kemudiannya dipindahkan kepada plaintif kedua. Plaintif dalam kes ini berpendapat bahawa

defendan telah melanggar perjanjian pemegang saham dengan: (a) melupuskan harta yang dipegang oleh anak syarikat tanpa pengetahuan pihak plaintif; (b) memperuntukkan saham dalam syarikat sebagai pertimbangan untuk pembelian keseluruhan modal saham dua syarikat yang dikenali sebagai Swiftlet Eco Park Bhd dan Royal Birds Nest Sdn Bhd; (c) menyebabkan anak syarikat terlibat dalam urusan dan penawaran saham keutamaan boleh tukar dan boleh ditebus dari defendan keenam tanpa pengetahuan plainitf-plaintif; dan (d) memindahkan saham dalam syarikat yang dimiliki oleh defendan pertama hingga keempat kepada defendan keenam tanpa persetujuan plaintif-plaintif dan melanggar hak penolakan pertama yang diperuntukkan di bawah perjanjian pemegang saham. Pelanggaran ini memberi hak kepada plaintif-plaintif untuk menguatkuasakan klausa pembelian yang terdapat dalam perjanjian pemegang saham. Defendan mencabar penguatkuasaan perjanjian pemegang saham dan berhujah bahawa: (i) tandatangan defendan ketiga dan keempat pada perjanjian pemegang saham telah dipalsukan; (ii) plaintif ketiga telah memberikan representasi yang salah kepada defendan pertama dan kedua bahawa plaintif ketiga, melalui seorang Dato' Sri To Kam Foo, akan memastikan bahawa tindakan korporat tertentu akan dilakukan berkaitan dengan saham dalam syarikat ('representasi'); (iii) penyempurnaan pelaksanaan korporat yang memuaskan adalah pra-syarat penguatkuasaan perjanjian pemegang saham; dan (iv) tidak ada priviti antara defendan pertama hingga keempat dan plaintif kedua. Defendan pertama dan kedua juga membuat tuntutan balas bahawa pihak plaintif telah melanggar perjanjian penjualan saham yang telah dimeterai antara pihak plaintif dan defendan pertama dan kedua, yang menyatakan penyempurnaan yang memuaskan pelaksanaan korporat tertentu sebagai pra-syarat.

**Diputuskan**, membenarkan tuntutan plaintif-plaintif dengan kos; menolak tuntutan balas defendan-defendan:

(1) Pada 9 September 2015, setiausaha syarikat melalui e-mel balas kepada plaintif pertama, yang mana e-melnya disalin kepada defendan ketiga dan keempat, telah memberikan nasihat terperinci mengenai syarat-syarat korum berdasarkan perjanjian pemegang saham, namun, tidak ada respon oleh defendan ketiga dan keempat yang mempersoalkan perjanjian pemegang saham. Begitu juga, pada 26 Februari 2016, melalui surat kepada lembaga pengarah syarikat, plaintif pertama telah membuat rujukan khusus mengenai perjanjian pemegang saham tetapi tidak ada respon oleh defendan ketiga dan keempat. Hanya pada 7 Jun 2016 pertikaian mengenai pemalsuan tandatangan dikemukakan oleh defendan-defendan. Berdasarkan keterangan dokumentari serentak yang tidak dipertikaikan, tuduhan pemalsuan tidak dibuktikan dan tidak

A lebih dari sekadar fikiran terkemudian (lihat perenggan 11, 17–20 & 22).

(2) Dari segi undang-undang, representasi yang kononnya dibuat oleh plaintif ketiga, tidak dapat memberikan kesan undang-undang kerana terdapat klausa keseluruhan perjanjian terkandung dalam perjanjian pemegang saham. Selanjutnya, pemeriksaan terhadap perjanjian pemegang saham akan menunjukkan bahawa penyempurnaan pelaksanaan korporat yang memuaskan bukanlah pra-syarat kepada penguatkuasaan perjanjian pemegang saham. Walaupun terdapat syarat seperti itu dalam perjanjian penjualan saham di mana pihak plaintif memperoleh saham mereka di syarikat, kesimpulan yang tidak dapat dielakkan adalah bahawa pematuhan kepada pra-syarat ini telah diabaikan, kerana tidak dipertikaikan bahawa perjanjian penjualan saham tersebut telah disempurnakan (lihat perenggan 11, 26 & 35).

(3) Melalui surat bertarikh 22 Ogos 2011 di mana plaintif kedua berjanji untuk terikat dengan terma perjanjian pemegang saham sudah cukup untuk mewujudkan priviti antara plaintif kedua dan defendan pertama hingga keempat setelah surat tersebut diterima oleh defendan pertama hingga keempat. Di bawah klausa 6.4 perjanjian pemegang saham, para pihak dalam perjanjian pemegang saham telah menyetujui bahawa, setelah pemindah saham dalam syarikat telah melakukan hal tertentu (dalam hal ini menandatangani persetujuan kepatuhan dan aksesi di mana ia bersetuju untuk terikat dengan perjanjian pemegang saham), maka pemindah itu akan 'berhak mendapat manfaat' dari perjanjian pemegang saham. Tidak terdapat syarat bagi semua pemegang saham untuk menandatangani sekeping kertas yang sama agar mereka terikat dengan terma-terma perjanjian pemegang saham (lihat perenggan 11 & 47–49).

(4) Mesyuarat lembaga pengarah pada 26 Ogos 2015 telah secara sahnya memutuskan untuk membenarkan pemerolehan saham syarikat Swiflet Eco Park Bhd dan Royal Bird's Nest Sdn Bhd namun syarat korum khas yang dinyatakan dalam perjanjian pemegang saham agar mesyuarat lembaga meluluskan urus niaga seperti ini tidak dipatuhi oleh defendan. Oleh itu, terdapat pelanggaran oleh defendan pertama hingga keempat terhadap tanggungjawab mereka berdasarkan perjanjian pemegang saham (lihat perenggan 50 & 54).

(5) Pemindahan saham syarikat oleh Pesona Metro Sdn Bhd kepada plaintif kedua dan akujanji berikutnya oleh plaintif kedua untuk terikat dengan syarat-syarat perjanjian pemegang saham mengakibatkan plaintif kedua menggantikan Pesona Metro Sdn Bhd seolah-olah ia adalah pihak dalam perjanjian pemegang saham sebagai pengganti Persona Metro Sdn Bhd. Oleh itu, tidak ada persoalan bahawa defendan pertama hingga keempat dibebaskan dari kewajiban mereka untuk mendapatkan persetujuan bertulis dari pihak plaintif kedua dan ketiga di bawah klausa 6.1

perjanjian pemegang saham, atau kewajiban mereka untuk mematuhi hak penolakan pertama plaintif pertama dan ketiga di bawah klausa 6.2. Oleh itu, terdapat pelanggaran oleh defendan pertama hingga keempat terhadap kewajiban mereka berdasarkan perjanjian pemegang saham dalam hal ini (lihat perenggan 50 & 71–72).

(6) Tidak dipertikaikan secara material bahawa syarikat mempunyai aset ketara bersih ('AKT') berstatus negatif setakat 31 Disember 2016. Oleh kerana AKT bagi setiap saham syarikat adalah negatif, maka plaintif berhak memperoleh saham yang dipegang oleh defendan pertama hingga keempat dalam syarikat dengan bayaran RM1. Selanjutnya, berdasarkan niat jelas para pihak seperti yang dinyatakan dalam klausa 12.2 perjanjian pemegang saham, klausa pembelian dalam hal ini akan menjadi kewajiban utama defendan pertama hingga keempat dan dengan demikian tidak akan menjadi 'penetapan sebagai penalti' bagi maksud s 75 Akta Kontrak 1950 (lihat perenggan 78–79 & 89).]

**Cases referred to**

*Arnold v Britton and others* [2016] 1 All ER 1; [2015] UKSC 36, SC (refd)
*Berjaya Times Square Sdn Bhd v Twingems Sdn Bhd & Anor and another action* [2012] 9 MLJ 510; [2012] 1 LNS 166, HC (refd)
*Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis* [2016] 2 All ER 519; [2015] UKSC 67, SC (refd)
*Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, HL (refd)
*Guthrie Waugh Bhd v Malaiappan Muthuchumaru* [1972] 2 MLJ 62, FC (refd)
*Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611, ChD (distd)
*Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11; [2002] 4 CLJ 729, HC (refd)

**Legislation referred to**

Capital Markets and Services Act 2007
Contracts Act 1950 ss 14, 19(1), 24, 75
Mental Health Act 2001 s 56
Misrepresentation Act 1967 [UK] ss 2, 3
Rules of Court 2012 O 76 r 1A

*Edmund Bon (New Sin Yew and Kelvesh Deshenraj with him) (Jamie Wong) for the plaintiff.*
*George Miranda (Rubachandran Govindasamy with him) (Miranda & Samuel) for the defendant.*

**Azizul Azmi Adnan J:**

INTRODUCTION

**[1]** The plaintiffs in this case sought to enforce the terms of a shareholders' agreement ('shareholders' agreement') against the defendants. After trial, I allowed the plaintiff's claim for the enforcement of a buy-out clause contained in the shareholders' agreement.

MATERIAL BACKGROUND FACTS

**[2]** The first and third plaintiffs in this case had entered into the shareholders' agreement on 19 November 2010 with the first to the fourth defendants, to govern their relationship inter se in a joint venture company. This joint venture company is the fifth defendant, Swiftlet Eco Park Holdings Sdn Bhd, referred to in this judgment as the 'company'.

**[3]** The sixth defendant is a company registered in the Cayman Islands. The first to fourth defendants had transferred their shares in the company to the sixth defendant.

**[4]** The plaintiffs contended that the defendants had breached of the shareholders' agreement by:

(a) disposing of a property held by a subsidiary of the company without the plaintiff's knowledge;

(b) allotting shares in the company as consideration for the purchase of the entire share capital of two companies known as Swiftlet Eco Park Bhd and Royal Birds Nest Sdn Bhd;

(c) causing a subsidiary of the company to engage in the dealing and offering of redeemable convertible preference shares of the sixth defendant without the plaintiff's knowledge; and

(d) transferring the shares in the company held by the first to fourth defendants to the sixth defendant without the plaintiffs' consent and in breach of the rights of first refusal provided for under the shareholders' agreement.

**[5]** The plaintiffs contended that these breaches entitled them to enforce a buy-out clause contained in the shareholders' agreement, which entitled a non-defaulting shareholder to purchase the shares of a defaulting shareholder at a price to be determined by reference to the net tangible assets of the company.

**[6]** The first to fourth defendants denied that they had breached the shareholders' agreement. They contended that:

(a) the shareholders' agreement was void because the signatures of the third and fourth defendants were forged; and

(b) the shareholders' agreement was voidable for misrepresentation;

**[7]** The first and second defendants also counterclaimed that the plaintiffs had breached the share sale agreements that had been entered into between the each of the plaintiffs and the first and second defendants, which specified the satisfactory completion of certain corporate exercises as a condition precedent.

THE PRELIMINARY OBJECTION

**[8]** It was contended by counsel for the defendants that the plaintiffs' claims ought to be struck out for non-compliance with O 76 r 1A of the Rules of Court 2012, which required leave of court in order for proceedings to be brought against a person who has been declared to be mentally disordered pursuant to s 56 of the Mental Health Act 2001.

**[9]** The first defendant in this action has been declared to be mentally disordered pursuant to an order of the High Court granted on 4 October 2016.

**[10]** I dismissed the preliminary objection on the basis that both leave and an extension of time have in fact been granted by this court on 25 April 2018 to the plaintiffs pursuant to their application in encl 136.

THE ENFORCEABILITY OF THE SHAREHOLDERS' AGREEMENT

**[11]** The defendants challenged the enforceability of the shareholders' agreement. The following paragraphs summarise the specific contentions and the findings of this court:

(a) the third and fourth defendants argued that their signatures on the shareholders agreement had been forged.

I found that, having regard to the undisputed contemporaneous documentary evidence, this allegation of forgery had not been made out and was no more than mere afterthought (see paras 13–23, *post*);

(b) the first and second defendants claimed that the third plaintiff had misrepresented to them that the third plaintiff, through one Dato' Sri To Kam Foo, would procure that certain corporate exercises would be carried out in connection with the shares in the company.

I found that, as a matter of law, the representations purportedly made by the third plaintiff, could not have had legal effect because of an entire agreement clause contained in the shareholders' agreement (see paras 23–33, *post*);

(c) it was argued that satisfactory completion of the corporate exercises were conditions precedent to the enforceability of the shareholders' agreement.

An examination of the shareholders' agreement will reveal that this was not the case. Even though there was such a condition precedent in the share sale agreements by which the plaintiffs acquired their shares in the company, the inescapable conclusion was that compliance with this condition precedent had been waived, for it was not in dispute that the share sale agreements had proceeded to completion (see paras 34–36, *post*); and

(d) the first to fourth defendants argued that there was no privity between them and the second plaintiff. The shareholders' agreement had originally been executed by one Pesona Metro Sdn Bhd, whose shares in the company were subsequently transferred to the third plaintiff. The defendants argued that the second plaintiff, although it became a shareholder in the company, had not executed a deed of adherence and accession with the first to fourth defendants, and for this reason they were not bound by the terms on the shareholders' agreement vis a vis the second plaintiff; and

I found that the letter of 22 August 2011 by which the second plaintiff undertook to be bound by the terms of the shareholders' agreement was sufficient to create privity between the second plaintiff and the first to fourth defendants once that letter was received by the first to fourth defendants (see paras 37–49, *post*).

**[12]** The analyses and findings are explained in detail in the following paragraphs.

*The contention of fraud by the third and fourth defendants*

**[13]** The third and fourth defendants contended that they had not signed the shareholders' agreement and that the signatures on the agreement that purported to be their signatures were forgeries. Consequently, the shareholders' agreement — it was argued — was void for illegality pursuant to s 24 of the Contracts Act 1950.

**[14]** The respective parties called handwriting experts to testify. Not unexpectedly, they disagreed with one another. The plaintiffs' expert was of the opinion that the disputed signatures of the third and fourth defendants were not forged. The defendants' expert, by contrast, testified that the disputed signature said to belong to the third defendant was not his, while the

authorship of the signature purportedly belonging to the fourth defendant could not be ascertained by the defendants' expert. A

**[15]** The handwriting experts' testimonies were equivocal. While each of the experts put forth valid points in support of their opinions, I am of the view that neither opinion had much to commend over the other. B

**[16]** However, when the contentions of the respective parties were examined against the undisputed contemporaneous evidence — in particular the documentary evidence — a picture emerged that favoured the version of events put forth by the plaintiffs. C

**[17]** It will be recalled that the shareholders' agreement was signed (or was purported to have been signed) on 19 November 2010. On 9 September 2015, the first plaintiff, Mr Wu Sor Hwa, wrote to the company secretary of the company commenting on draft minutes of the board meeting held on 26 August 2015. In this email, he requested that an amendment be made to the minutes to reflect the fact that he (Mr Wu) had requested that the company secretary advises the board and management on matters that require shareholders' approval under the shareholders' agreement. The company secretary wrote a response to Mr Wu, which response was copied to the directors of the company, including the third and fourth defendants. Although the email was nominally directed to Mr Wu and merely copied to the board of directors, the company secretary addressed his email to 'Data Seri & Board members' in the body of his email. In this email, the company secretary gave detailed advice regarding the quorum requirements under the shareholders' agreement, even to the extent of suggesting that three board meetings in 2015 may not have met the quorum requirements. This, it will be appreciated, would be a serious matter. A sufficiently serious matter, in my view, that would cause any right thinking board member to sit upright and to pay close attention. D E F G

**[18]** Now, if it was true that the third and fourth defendant had not signed the shareholders' agreement, it would be reasonable to expect that, in response to this correspondence between the first plaintiff and the company secretary, they would exclaim with consternation, 'What shareholders' agreement?!'. But no such response was forthcoming from them. More so when the company secretary directed his advice to the board of directors. H

**[19]** Later, on 26 February 2016, Mr Wu sent a letter to the board of directors of the company raising concerns regarding the governance of the company and making specific reference to the shareholders' agreement. The third and fourth defendants were copied in this letter. Here again, there was no response from them, disclaiming knowledge of any such shareholders' agreement or even requesting copies of the agreement. I

**[20]** It was only on 7 June 2016 that the firm of Miranda & Samuel wrote to the firm of Messrs Jamie Wong, raising for the first time the contention of forgery. This letter was written in response to a letter from Messrs Jamie Wong dated 19 May 2016.

**[21]** These objective and undisputed facts support the position that the third and fourth defendants had known about the shareholders' agreement all along, and that the allegation of forgery was no more than an attempt to escape from their obligations under the agreement, which was concocted after a legal demand from the plaintiffs.

**[22]** In my assessment of the evidence that was before me, I was unable to conclude that the third and fourth defendants' contention of fraud had been made out on a balance of probabilities. The evidential burden of establishing fraud lay on the third and fourth defendants, for it was they who alleged and accordingly it is they who must prove. While the handwriting experts' testimonies were inconclusive in that they both supported competing assertions, the allegation of fraud, when viewed against the contemporaneous and undisputed documents, was incapable of being sustained by the court.

*Misrepresentation*

**[23]** It was contended by the first and second defendants that one Dato' Sri Desmond To Kam Foo had, on behalf of the third plaintiff, represented to the first and second defendants that he (Dato' Sri To) would bring in investors and carry out an initial public offering of the shares of the company or arrange for the reverse take-over of a publicly listed company (the claims for misrepresentation against the other plaintiffs were abandoned after trial). (To Kam Foo is the husband of Leang Lung Ye, the third plaintiff's nominee to the board of the company. It was not in material dispute that To Kam Foo was the guiding mind behind the third plaintiff.) The first and second defendants argued that, as a result of these representations, they had been induced to enter into the shareholders' agreement. Accordingly — so it was argued — the shareholders' agreement was voidable on account of misrepresentation, pursuant to s 19(1) of the Contracts Act 1950.

**[24]** Section 19(1) provides as follows:

> 19 Voidability of agreements without free consent
>
> (1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

**[25]** The first and second defendants claimed that there were two misrepresentations purportedly committed by the To Kam Foo:

(a) To Kam Foo told them that he already had a target company for the purposes of undertaking a reverse take-over and that it was a 'confirmed deal'; and

(b) To Kam Foo told them that he would be responsible to undertake the corporate exercises that would ultimately lead to the company attaining listing status, or being part of a listed group of companies.

**[26]** In my judgment, the contention of misrepresentation failed at the very outset because of the existence of an entire agreement clause in the shareholders' agreement.

**[27]** Clause 8 of the shareholders' agreement provided as follows:

> 8. Previous Agreements
>
> This Agreement and the documents referred to in its provisions are in substitution for all previous agreements between all or any of the parties and contain the whole agreement between the parties relating to the subject matter of this Agreement.

**[28]** Clause 8 is an example of what is commonly referred to as an entire agreement clause, the object of which is to attain certainty of terms. In *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611, the purpose of such a clause was explained in the following terms:

> The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document.

**[29]** The effect of an entire agreement clause would be preclude the operation of an oral representation (see, for example, *Berjaya Times Square Sdn Bhd v Twingems Sdn Bhd & Anor and another action* [2012] 9 MLJ 510; [2012] 1 LNS 166 as well as a collateral contract (see *Macronet Sdn Bhd v RHB Bank Sdn Bhd* [2002] 3 MLJ 11; [2002] 4 CLJ 729).

**[30]** Lightman J in *Inntrepreneur Pub Co v East Crown Ltd* opined that:

> An entire agreement provision does not preclude a claim in misrepresentation, for the denial of contractual force to a statement cannot affect the status of the statement as a misrepresentation.

**[31]** In my judgment, this position does not hold true in Malaysia, for the reason that misrepresentation in England is a statutory cause of action pursuant to s 2 of the (UK) Misrepresentation Act 1967, s 3 of which renders void any contractual provision that excludes or limits liability for misrepresentation unless it is shown to be reasonable. By contrast, in Malaysia under the Contracts Act 1950, misrepresentation operates in contract in that it vitiates free consent (see s 14 of the Contracts Act 1950) and does not form the basis of a separate statutory cause of action. Thus, if a party to a contract that contains an entire agreement clause wishes to obtain the benefit of a representation from the other party, it must ensure that that representation is expressly set out in the contract. Failure to do so will preclude a claim of misrepresentation predicated on an oral representation operating outside the confines of the written agreement.

**[32]** There is, in any event, Malaysian High Court authority in *Berjaya Times Square Sdn Bhd v Twingems* for the principle that a plea of misrepresentation cannot stand in the light of an entire agreement clause.

**[33]** For these reasons, the counterclaim of the first and second defendants in connection with the allegation of misrepresentation by the third plaintiff was dismissed.

*Non-fulfilment of condition precedent*

**[34]** Mr Miranda for the defendants raised in his written submissions the fact that the three share sale agreements by which the plaintiffs acquired their shares in the company contained a condition precedent that the corporate exercises involving either an initial public offering or a reverse take-over must first have been satisfactorily completed.

**[35]** It is not in dispute that the shares that were the subject of the share sale agreements were transferred to the plaintiffs and that the plaintiffs were shareholders in the company. It follows by necessary inference that, because the initial public offering or the reverse take-over exercise have not yet taken place, compliance with the relevant condition precedent must have been waived. The claims by the first and second defendants that there had been a breach by the plaintiffs of their obligations under the respective share sale agreements were thus unfounded.

**[36]** In the context of the shareholders' agreement, the condition precedent was not reflected in the shareholders' agreement. All that was specified was for completion of the sale and purchase of the shares under the share sale agreements to occur. There was thus no doubt at all that the shareholders' agreement had come into effect.

*Whether there was privity between the defendants and the second plaintiff*

**[37]** Mr Miranda for the defendants argued that the terms of the shareholders' agreement did not bind the first to fourth defendants to the second plaintiff. The reason, it was argued, was that the second plaintiff did not execute any deed of adherence and accession.

**[38]** I found that the first to fourth defendants were in fact bound to the second plaintiff on the terms of the shareholders' agreement, based on the proper construction of both the shareholders' agreement itself and the undertaking given by the second plaintiff. In any event, even if the second plaintiff was not in a position to enforce the shareholders' agreement against the first to fourth defendants, it did not change the fact that the latter's shares were liable to be acquired by the first and third plaintiffs in accordance with the terms of the buy-out clause.

**[39]** The first and third plaintiffs had entered into share sale agreements to acquire shares in the company on 18 October 2010. A company known as Pesona Metro Sdn Bhd also executed a share sale agreement to acquire shares in the company on the same date.

**[40]** They each signed a shareholders' agreement on 19 November 2010. The other shareholders in the company, being the first to the fourth defendants, also signed the shareholders' agreement.

**[41]** In October 2011, Pesona Metro Sdn Bhd transferred its shares to the second plaintiff, Artisan Pesona Sdn Bhd. Clause 6.6 of the shareholders' agreement created a pre-emption right of the remaining shareholders to acquire the shares that was sought to be transferred by Persona Metro Sdn Bhd, in proportion to their shareholding. A letter dated 11 August 2011 from Pesona Metro Sdn Bhd (B1/126) recorded that each of the other shareholders had consented to the transfer of the shares held by Pesona Metro Sdn Bhd to the second plaintiff. I concluded from this letter, and by the fact that there was no evidence to suggest anything to the contrary, that the first to fourth defendants had waived their rights of pre-emption under cl 6.6.

**[42]** Clause 6.4 of the shareholders' agreement purported to require any incoming shareholder to execute a deed of adherence and accession by which it

will agree to be bound by the terms of the shareholders' agreement (there was a logical difficulty with the way this clause was worded: a prospective incoming shareholder would not yet be bound by the terms of the shareholders' agreement until it executes a deed of adherence and accession, and as such, cl 6.4 would be ineffective to create binding obligations on the prospective shareholder, for the very reason that it was not a party to the shareholders' agreement and thus not bound by its terms until it executed the deed. The proper course would have been to instead create an obligation on the part of the outgoing shareholder (ie the transferor) to procure the execution of the deed by the incoming shareholder. This point, however, is not material to the determination of the issue at hand).

**[43]** The form of the deed of adherence and accession was not prescribed by the shareholders' agreement.

**[44]** Was there a deed of adherence and accession in this case? The defendants' position was that there was not. Learned counsel for the defendant pointed out that even Mr Wu Sor Hwa (the first plaintiff, who was also testifying for the second plaintiff) had himself acknowledged in cross-examination that no evidence was adduced that the first to fourth defendants had agreed to be personally bound by the terms of the shareholders' agreement to the second plaintiff.

**[45]** Two observations may be made at the outset:

(a) first, the question of the legal effect of any document that has been tendered in evidence is a question of law. Thus, regardless of any views that may have been expressed by witnesses, whether or not any particular document that is in evidence has the effect of binding the parties would be a matter for the court to determine; and

(b) secondly, the effect of any particular document is dependent upon the true construction of its terms, regardless of any label or appellation that may or may not have been applied to the document.

**[46]** On 22 August 2011, the second plaintiff wrote to the board of the company and each of the shareholders in the company (apart from the Pesona Metro Sdn Bhd). The letter read as follows:

> Dear Sirs
>
> *Re: SWIFTLET ECOPARK HOLDINGS SDN BHD (COMPANY NO. 867568-V) SHAREHOLDERS AGREEMENT DATED THE 19TH DAY OF NOVEMBER, 2010*

1. With reference to the above, we write to confirm our agreement to take over the 11.68% shares of SWIFTLET ECOPARK HOLDINGS SDN BHD [Company No. 867568-V] from PESONA METRO SDN BHD [Company No. 401658-P].

2. Upon the transfer of the said 11.68% shares to us, we hereby irrevocably agree and undertake to be bound by the terms and conditions of the Shareholders' Agreement dated the 19*th* day of November, 2010, as if we were a party to the said agreement in place of PESONA METRO SDN BHD [Company No. 401658-P].

3. In view of the above, kindly instruct the Company Secretary to prepare the necessary resolutions and new share certificates.

Yours faithfully,

[signed]

Director

**[47]** It is clear from the terms of this letter of 22 August 2011, that the second plaintiff has agreed and undertaken to be bound by the terms of the shareholders' agreement. It is not, however, a document that has been countersigned by the defendants. Did it therefore bind the defendants?

**[48]** In my view, it did. The reasons are as follows:

(a) the first point is that, by the terms of cl 6.4 of the shareholders' agreement, the other shareholders have agreed that, once the transferee of shares has agreed to be bound by the shareholders' agreement, the transferee will 'be entitled to the benefit' of the shareholders' agreement. Clause 6.4 provided as follows:

6.4 All third parties which acquire shares in the Company shall (unless PC and/or PM directs otherwise) enter into a deed of adherence and accession under which the third party shall agree to be bound by the obligations, and shall be entitled to the benefit, of this Agreement (in place of the transferor of those Shares, where applicable).

It can be seen that, under this clause 6.4, the parties to the shareholders' agreement have agreed that, once a transferor of shares in the company has done a particular thing (in this case execute a deed of adherence and accession by which it agrees to be bound by the shareholders' agreement), then that transferor will be 'entitled to the benefit' of the shareholders' agreement. 'Being entitled to the benefit' of the agreement means that the transferor will have all the rights of a shareholder under the shareholders' agreement. There is no requirement for all the shareholders to execute the same piece of paper for them to be bound inter se on the terms of the shareholders' agreement.

To analyse this scenario in the classical framework of offer and acceptance in contract: cl 6.4 amounts to an offer by the remaining shareholders to any

incoming shareholder that is capable of acceptance by the incoming shareholder. The acceptance is concluded by the incoming shareholder agreeing to be bound by the terms of the shareholders' agreement. Once the acceptance is communicated to the remaining shareholders, then the contract between them-upon the terms of the shareholders' agreement-comes into existence.

A clause of this nature is not uncommon in shareholders' agreements. Once a shareholder has agreed for the transfer of shares by another shareholder to the transferee — and this agreement is manifested by the shareholder waiving its right of pre-emption — all that remains is for the incoming shareholder to undertake to agree to be bound by the terms of the shareholders' agreement. This mechanism obviates the practical difficulties of having to convene a physical meeting at which all the shareholders re-execute the shareholders' agreement, or the circulation of the shareholders' agreement for re-execution;

(b) of course, the letter of 22 August 2011 was not executed under seal, and hence it was not, strictly speaking, a 'deed'. However, under Malaysian law, there is no meaningful difference between a 'deed' and a 'contract'.

At common law, a deed need not be supported by consideration in order to be enforceable. That is not the case in Malaysia: see for example the case of *Guthrie Waugh Bhd v Malaiappan Muthuchumaru* [1972] 2 MLJ 62, where the Federal Court proceeded on the basis that a deed of arrangement still needed to be supported by consideration in order to be enforceable.

The key and operative effect of cl 6.4 was thus not the form of the document to be executed by the incoming shareholder, but rather its legal effect. All that was necessary was for the incoming shareholder to undertake that it will abide by the terms of the shareholders' agreement. Once it has done so, it will obtain all the rights of a shareholder of the company under the terms of the shareholders' agreement. This was patently done under the terms of the 22 August 2011 letter, which meant that the second plaintiff became entitled to the rights of shareholder under the shareholders' agreement upon the effective transfer of the 11.68% shares in the company by Pesona Metro Sdn Bhd to it.

Accordingly, even though the letter was evidently not a deed, and was not described as a 'deed of adherence and accession', it was nonetheless sufficient to constitute an acceptance by the second plaintiff of the 'offer' comprised within cl 6.4 of the shareholders' agreement, and thus operated to bind the first to fourth defendants and the plaintiffs inter se, qua shareholders of the company;

(c) thirdly, the defendants had all and every opportunity to object to the transfer of the shares in the company to the second plaintiff, and to correct the

second plaintiff when the latter had stated in the letter that it would be bound to the terms of the shareholders' agreement as if it were a party to the agreement in place of Pesona Metro Sdn Bhd.

Thus, even if the first to fourth defendants were correct that there was no binding deed of adherence and accession executed by the second plaintiff, their failure to object at any time before or after the transfer of shares and their acceptance of the second plaintiff as a shareholder in the company meant that it was too late now for them to insist upon adherence to the strict terms of the shareholders' agreement in as far as cl 6.4 and the deed of adherence and accession were concerned. They had, by their conduct, led the second plaintiff to believe that the terms of the shareholders' agreement bound their relationship inter se, and were now estopped from denying this to be the case.

**[49]** For these reasons, I was of the view that terms of the shareholders' agreement were enforceable by the second plaintiff against the first to fourth defendants. In any event, even if the second plaintiff were unable to enforce the buy-out terms against the first to fourth defendants, this did not affect the ability of the first and third plaintiffs to enforce the terms of the buy-out clause against the first to the fourth defendants. The basis upon which the defendants sought to deny the relief claimed by the second plaintiff did not apply to the rest of the plaintiffs, as these plaintiffs were signatories to the original shareholders' agreement. If their contentions of breach were made out, the first and third plaintiffs would be entitled to buy out all the shares in the company held by the first to fourth defendants.

THE CONTENDED BREACHES

**[50]** Having established that the shareholders' agreement constituted enforceable obligations of the first to fourth defendants, I now address the breaches that were alleged:

(a) the plaintiffs contended that acquisition of shares in two companies, Swiftlet Eco Park Bhd and Royal Bird's Nest Sdn Bhd, and the issue and allotment of new shares in the company as consideration constituted a breach of the special quorum requirements under the shareholders' agreement.

I found that this claim has been made out, for the reasons explained at paras 52–66, post;

(b) the first to fourth defendants transferred their shares in the company to the sixth defendant, Royal Bird's Nest (Cayman) Ltd, in return for which they received shares in the sixth defendant.

I found that this share swap contravened the terms of the shareholders agreement, for the reasons explained at paras 67–72, post;

(c) in relation to the sale by a subsidiary of the company of its piece of land in Negeri Sembilan: I was of the view that this sale was not subject to the special quorum requirements under the shareholders' agreement, because the express words of the shareholders' agreement did not cover transactions conducted outside the ordinary course of business by a subsidiary of the company (see para 73(a), post); and

(d) in relation to the offering to the public of redeemable convertible preference in the sixth defendant, Royal Bird's Nest (Cayman) Ltd: I was of the view that this offering did not require the prior approval of the board of directors of the company, for the simple reason that the sixth defendant was not a subsidiary of the company (see para 73(b), post).

**[51]** These points are explained in turn in the following paragraphs.

*Allotment of shares in the company*

**[52]** The company acquired the remaining shares in two companies that were not already owned by the company. These two companies were Swiftlet Eco Park Bhd and Royal Bird's Nest Sdn Bhd. The consideration for these acquisitions was the issue and allotment of new shares in the company. It was not in dispute that the issuance of the new shares to the vendors of the shares would have a dilutive effect on the shareholding of the shareholders in the company as at a date immediately prior to the acquisition.

**[53]** The plaintiffs contended that the acquisition of shares in the two companies and the issue and allotment of the consideration shares constituted a breach of the terms of the shareholders' agreement.

**[54]** I was of the view that the board meeting of 26 August 2015 had effectively resolved to approve the acquisition by the company of shares in Swiflet Eco Park Bhd and Royal Bird's Nest Sdn Bhd, and that the special quorum requirements specified in the shareholders' agreement for board meetings to approve transactions of this nature had not been complied with by the defendants. There was thus a breach by the first to fourth defendants of their obligations under the shareholders' agreement. This is explained in the following paragraphs.

**[55]** The relevant provision of the shareholders' agreement provided as follows:

> 4.14 As between the parties hereto, it is understood and agreed that no business with regards to any of the major matters set out hereunder shall be transacted at any

meeting of the Board unless there shall be present a quorum comprising not less than seven (7) Directors of which there shall be at least One (1) Director each appointed by PC and PM and five (5) Director(s) appointed by VS. The major matters referred hereinabove are:

(i) any increase or reduction of the authorised or issued share capital of the Company and/or the creation or issue of any loan capital obligation convertible into share capital or loan capital and/or the grant of any option or right to subscribe for any of the same;

...

(v) the formation or acquisition of any subsidiary of the Company or subscriptions or acquisitions of shares or loan capital in any company.

**[56]** The issue and allotment of the consideration shares by the company would have been a 'major matter' coming with cl 4.14(i) above. In addition, the acquisition by the company of the shares in the two companies would have come within cl 4.14(v).

**[57]** By the terms of cl 4.14, a major matter would have required a board meeting to have been convened and for the board meeting to comply with a special quorum requirement. This quorum requirement (among others) made the presence of the directors nominated by the second and third plaintiffs mandatory ('PC' referred to the third plaintiff, while 'PM' referred to Pesona Metro Sdn Bhd, which I have held at para 48 above to have been substituted by the second plaintiff).

**[58]** Strikingly, the shareholders' agreement did not contain any shareholder reserved matters or supermajority provisions. By this I mean that there were no provisions in the agreement that required either unanimity to be attained for the passing of any shareholders' resolutions, or for the assent of particular minority shareholders to be obtained. Thus a minority shareholder could not veto a matter that has been proposed at a general meeting of the company. A shareholder or a block of shareholders holding the majority of the shares would be able to push through any ordinary resolution.

**[59]** Thus, if the second and third plaintiffs sought to resist a transaction being proposed that was within the scope of a 'major matter' within the meaning of the shareholders' agreement, it would have had to ensure that it did not attend the board meeting convened to approve that transaction. The assent of the nominated director was not necessary for the board resolution to carry; all that was needed was for the special quorum requirement to be fulfilled. The non-attendance of their nominated representatives would have meant that the

special quorum requirement would remain unfulfilled.

**[60]** It was not in dispute that, on the facts of this case:

(a) the proposal for the acquisition of the shares in the two companies was brought up at a board meeting on 1 July 2015. At this meeting, the board 'agreed in principle' to the proposal for the acquisition of the shares, but required that the valuation that was presented to be reviewed in order to ensure, among others, a fair valuation. Present at this meeting were a representative of the second plaintiff and Dato' Sri Desmond To Kam Foo. (It will be recalled is husband of Leang Lung Ye. Leang Lung Ye was the third plaintiff's nominee to the board of the company, but she herself was not present at this meeting);

(b) a further board meeting was convened on 26 August 2015. The proposed acquisitions were again tabled before the board. The minutes recorded (B2/376) that the board instructed the company secretary to convene a general meeting for the transactions to be approved by the shareholders. None of the nominated directors of the second or the third plaintiff or To Kam Foo was present at this meeting of 26 August 2015;

(c) an extraordinary general meeting of the company was convened on 9 March 2016. At this meeting, a shareholder resolution was carried, approving the acquisition of shares in the two companies by the issue and allotment of the consideration shares; and

(d) a board meeting was held immediately after the general meeting on 9 March 2016. At this meeting, the board approved the issue and allotment of the consideration shares.

**[61]** From the above, it is evident that the board meeting of 1 July 2015 could not be said to have approved of the share acquisitions in accordance with their terms. It was clear that the board itself anticipated that formal approval was necessary after closer examination of the valuations. The minutes of the subsequent board meeting on 26 August 2015 do not expressly record its approval of the transactions, but the company secretary was instructed to table the transactions before the company in general meeting, by which it can reasonably be inferred that the board had resolved to approve the transaction.

**[62]** Now, it has to be borne in mind that what was in contention was not the *validity* of the transactions. It was open for the company in general meeting to pass a resolution to approve the share acquisitions, and as a consequence, the transactions were binding upon the company. However, even though the transactions were validly entered into by the company, the act of the board approving the transactions and directing that they be tabled before the

company in general meeting nonetheless constituted a breach by the first to fourth defendants of the terms of the shareholders' agreement. The first to fourth defendants had expressly agreed that no business with regard to any of the major matters would be transacted at any board meeting unless the special quorum requirements were met. Even though the special quorum requirement was not fulfilled at the 26 August 2015 meeting, the first to fourth defendants nonetheless proceeded — at the board meeting — to effectively approve the share acquisitions by the company, which acquisitions constituted a 'major matter' within the meaning of shareholders' agreement.

**[63]** It was advanced for the defendants that the plaintiff had, by their prior conduct, waived compliance with the cl 4.14 of the shareholders' agreement . In his submissions, Mr Miranda for the defendants pointed out that it was not a disputed fact that Ms Leang Lung Ye had never attended any board meetings of the company. It was argued that, because there were many matters discussed by the board that fell within the ambit of a 'major matter' within the meaning of cl 4.14, and because the plaintiff did not previously raise any objections regarding the fact that the special quorum requirements had not been satisfied, it would be iniquitous for the court to permit the plaintiffs to insist upon strict compliance with the terms of cl 4.14 of the shareholders' agreement.

**[64]** On the evidence before me, even though Ms Leang had not attended any board meeting, her husband, Dato' Sri To Kam Foo, was present at some of the meetings of the board. By the defendants' own testimonies, they appeared to have accepted To Kam Foo's representations that the shareholders in the third plaintiff (being Ms Leang and her son) were To Kam Foo's nominees (see, for example, Q&A 51 of WSD1).

**[65]** Now, if the defendants accepted that To Kam Foo had attended some of the board meetings of the company as the de facto representative of the third plaintiff, I cannot see how they can, at the same time and in the same breath, contend that the plaintiffs had waived compliance with the special quorum requirement. Where To Kam Foo had been present at a board meeting together with the representatives of the other shareholders referred to in cl 4.14, the parties would have been entitled to regard the special quorum requirements as having been met, which in turn entitled the board to conduct matters pertaining to a 'major matter'. Indeed, by the fact that the defendants appeared to accept that To Kam Foo was representing the third plaintiff, there was no question of the defendants having been somehow led to believe that the third plaintiff had tacitly agreed for board meetings to be convened to decide on a major matter without the need for its representative to be present.

**[66]** For these reasons, I was of the view that the contention by the defendants — that there had been waiver by the plaintiffs of strict compliance with the special quorum requirements — had not been made out.

*The share swap*

**[67]** On 7 June 2016, the solicitors for the first to fifth defendants wrote to the solicitors for the plaintiffs, informing them that the first to fifth defendants did not regard the shareholders' agreement as being binding on them. Subsequently, on 30 June 2016, the first to fourth defendants transferred their shares in the company to Royal Bird's Nest (Cayman) Ltd, in return for which they received shares in Royal Bird's Nest (Cayman) Ltd.

**[68]** This share swap transaction was discovered by the plaintiffs on 27 March 2017, following which Royal Bird's Nest (Cayman) Ltd was added as the sixth defendant in the action. The plaintiffs also obtained an injunction against the defendants to prevent, among others, further disposals of the assets of the company and its subsidiaries as well as shares held by the first to fourth defendants in the sixth defendant, and the shares held by the sixth defendant in the company (the fifth defendant).

**[69]** The plaintiffs contended that the transfer by the first to fourth defendants of their shares in the company amounted to a breach by them of cll 6.1 and 6.2 of the shareholders' agreement. These provisions required the written consent of the second and third plaintiffs to be obtained before any transfer of shares in the company by the first to fourth defendants, and created a right of first refusal of the second and third plaintiffs in respect of an proposed transfer of shares.

**[70]** Mr Miranda for the defendants argued that, based on a proper construction of cll 6.1 and 6.2, the obligation on the first to fourth defendants to obtain written consent and the right of first refusal only remained in existence for as long as Pesona Metro Sdn Bhd and the third plaintiff remained a shareholder in the company. Because Pesona Metro Sdn Bhd had ceased to be a shareholder in the company when it transferred its shares to the second plaintiff, the first to fourth defendants were no longer bound — it was argued — to the terms of cll 6.1 and 6.2.

**[71]** In my judgment, the transfer of the shares in the company by Pesona Metro Sdn Bhd to the second plaintiff and the subsequent undertaking by the second plaintiff to be bound by the terms of the shareholders' agreement resulted in the second plaintiff being substituted for Pesona Metro Sdn Bhd as though it were a party to the shareholders' agreement in place of Persona Metro

Sdn Bhd (see the terms of the letter of 22 August 2011, reproduced at para 6 ante). This meant that, wherever Pesona Metro Sdn Bhd appeared in the shareholders' agreement, such references would be taken to be references to the second plaintiff, Artisan Pesona Sdn Bhd.

**[72]** Such being the case, there was no question of the first to fourth defendants being relieved of their obligation to obtain the written consent of the second and third plaintiffs under cl 6.1 of the shareholders' agreement, or of their obligation to comply with the second and third plaintiff's rights of first refusal under cl 6.2. I accordingly found that there had been a breach by the first to fourth defendants of their obligations under the shareholders' agreement in this regard.

*The other contended breaches*

**[73]** The two breaches discussed in the preceding paragraphs were, in my judgment, sufficient to give rise to a right of the plaintiffs to enforce their rights of buy-out under the shareholders' agreement. It is therefore unnecessary for me to deal with the other two contended breaches in detail, except for me to observe as follows:

(a) the first to fourth defendant had passed a resolution to cause a 60%-owned subsidiary of the company, Swiftlet Eco Park (NS) Sdn Bhd, dispose of a piece of land located in Negeri Sembilan to a company known as Best Rewards Sdn Bhd. In my view, this sale was not subject to the special quorum requirements under cl 4.14. This was because the plain words of cl 14.4(ii) made it clear that the special quorum requirements applied where a transaction was 'not in the ordinary course of the business of the company'. Even though the sale of the Negeri Sembilan land could not reasonably be said to have been carried out as part of the conduct of business in the ordinary course, the fact remains that the sale was carried out by Swiftlet Eco Park (NS) Sdn Bhd, and not by the company. Mr Bon for the plaintiffs submitted that such a construction made 'no commercial sense', and that the term 'Company' in this context must be read to mean the company and its subsidiaries. The short, and complete, answer to this is that there is no room for the principles of good commercial sense to be applied where to do would go against the plain words of a contract: see *Arnold v Britton and others* [2016] 1 All ER 1; [2015] UKSC 36; and

(b) the first to fourth defendants had purportedly caused the sixth defendant, Royal Bird's (Cayman) Ltd, to offer redeemable convertible preference shares to the public. The complaint of the plaintiffs was premised on the misapprehension that the sixth defendant was a

A subsidiary of the company. This was incorrect. The first to fourth defendants had sold their shares in company to the sixth defendant, in return for which they received shares in the sixth defendant. This meant that the sixth defendant holds shares in the company and not vice versa. Accordingly, there could not conceivably arise any breach of the
B shareholders' agreement by reason of the offer to the public of the redeemable convertible preference shares in the sixth defendant (for it was not a subsidiary of the company) . Nor was any approval of the board of directors of the company required. I note however, that an offer in Malaysia of redeemable convertible preference shares in a corporation
C incorporated outside Malaysia would attract the requirement to obtain the prior approval of the Securities Commission, and that the failure to obtain such prior approval may amount to a criminal offence under the Capital Markets and Services Act 2007.

D THE CONSEQUENCES OF BREACH

**[74]** Having established the enforceability of the shareholders' agreement and the fact that there had been breaches by the first to fourth defendants of its terms, the next question to be considered is whether, as a consequence of such
E breaches, the plaintiffs were entitled to enforce its rights of buy-out under the shareholders' agreement.

**[75]** Clause 12.2 of the shareholders' agreement provides for the ability of a party to buy out the shares of any party that has breached the terms the
F shareholders' agreement. The relevant clauses read as follows:

> 12 TERMINATION
>
> 12.1 If any of the following events shall occur:
>
> (i) A party shall fail to take all necessary action to remedy any breach of this
G Agreement within thirty (30) days from the service of any written notice by any other party hereto complaining of such breach;
>
> ...
>
> then and in any such event the other parties hereto, without prejudice to such other rights and remedies as it may have, be entitled to terminate this agreement in its
H entirety.
>
> 12.2 In the event that this Agreement is terminated on any of the grounds referred to in this Clause 12.1 above, the party in default or which is the cause for such termination ('the defaulting party') shall be deemed to have made an offer to the non-defaulting parties to purchase shares of the defaulting party. The offer price per
I share shall be determined by the auditors of the Company and shall be calculated as Net Tangible Assets/Total Number of Ordinary Shares Issued. Net Tangible Assets means Total Assets less Total Liabilities.

**[76]** In this case, the plaintiffs had issued a notice pursuant to cl 12.1(i) on 5 September 2016 requiring the first to fourth defendants to remedy their breach of the shareholders' agreement. Their failure to do so resulted directly to this suit being filed in October 2016.

**[77]** The plaintiffs thus sought to purchase the first to fourth defendants' shares in the company based on the net tangible assets per share of the company.

**[78]** It was not in material dispute that the company had negative net tangible assets as at 31 December 2016. The principal reason for such large liabilities was the fact that there were significant sums received from investors under the swiftlet farming scheme operated by the companies within the group. These investments were recorded as liabilities in the balance sheet of the company (amounting to almost RM230m).

**[79]** As the NTA per share of the company was a negative number, I was of the view that the plaintiffs were entitled to acquire the shares held by the first to fourth defendants in the company for the consideration of RM1.

**[80]** It was advanced for the defendants that the plaintiffs ought not be entitled to acquire the shares in the company belonging to the first to fourth defendants for RM1 because the buy-out provision in cl 12.2 was void as a penalty pursuant to s 75 of the Contracts Act 1950.

**[81]** Section 75 provides as follows:

> Section 75 Compensation for breach of contract where penalty stipulated for.
>
> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

**[82]** The locus classicus at common law dealing with penalty clauses is *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79. Lord Dunedin in that case formulated the following four tests to be applied when considering whether or a provision providing for liquidated damages was penal in nature and thus unenforceable:

(a) a provision would be penal if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that

could conceivably be provided to have followed from the breach;

(b) a provision would be penal if the breach consisted only in the non-payment of money and it provided for the payment of a larger sum;

(c) there was a presumption that a provision is penal if it was payable in number of events of varying gravity; and

(d) a provision would not be considered to be penal by reason only of the impossibility of precisely pre-estimating the true loss.

**[83]** The manner in which the relevant obligation is framed in the contract, and the proper construction of that obligation, affected the application of the penalty rule. Whether or not an obligation to pay a sum of money was penal in nature depended on whether it was properly construed as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages. Thus, where a contract provides for an obligation on a party to perform an act, and also provides that, if he fails to perform that obligation, he will pay the other party a specified sum of money, that payment obligation is a secondary obligation that may be construed as a penalty. On the other hand, if the contract does not expressly or impliedly impose an obligation to perform an act, but simply provides that if one party does not perform, he will have to pay the other party a specified sum, that obligation to pay the specified sum would be a conditional primary obligation and cannot be a penalty.

**[84]** The enforceability of a share buy-out clause was considered by the UK Supreme Court in *Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis* [2016] 2 All ER 519; [2015] UKSC 67. Mr Makdessi was the founder of a successful advertising and communications group of companies in the Middle East. He, together with one Mr Joseph Ghoussoub, sold a 60% majority stake in the company to Cavendish. The sellers retained 40%.

**[85]** The agreement contained a non-solicitation and non-compete clause, which Mr Makdessi breached by his involvement with a competitor of the group. The agreement contained an option which permitted Cavendish to buy out the remaining shares of a seller (priced at the net asset value per share) in the event that the seller breaches (among others) his non-compete obligations under the agreement.

**[86]** At first instance, Burton J held that the buy-out option was not unenforceable as a penalty. The Court of Appeal disagreed.

**[87]** The Supreme Court restored the finding of the trial judge, holding:

> [83] More fundamentally, a contractual provision conferring an option to acquire shares, not by way of compensation for a breach of contract but for distinct commercial reasons, belongs as it seems to us among the parties' primary obligations, even if the occasion for its operation is a breach of contract. This may be tested by asking how the penalty rule could be applied to it without making a new contract for the parties. The Court of Appeal simply treated cl 5.6 as unenforceable, and declared that Mr Makdessi was not obliged to sell his shares whether at the specified price or at all. That cannot be right, since the severance of the shareholding connection was in itself entirely legitimate, and indeed commercially sensible. If the option to acquire the retained shares is to stand, the price formula cannot be excised without substituting something else. Yet there is no juridical basis on which a different pricing formula can be imposed. There is no fall-back position at common law, as there is in the case of a damages clause.

**[88]** The Supreme Court was of the view that the purpose for requiring a defaulting shareholder to sell his retained shares was to sever the connection with the company and the major shareholder if he were to compete against it. This provided a distinct commercial reason for the buy-out option clause, beyond mere compensation for breach of contract. This in turn meant that the clause, on its proper construction, constituted a primary obligation of Mr Makdessi and was therefore not a penalty.

**[89]** On the facts of the present case, I was inclined the apply the same logic as that applied in *Cavendish Square Holding BV v El Makdessi* and to give effect to the express intention of the parties as set out in cl 12.2 of the shareholders' agreement. The buy-out clause in this case would be a primary obligation of the first to fourth defendants and thus would not be a 'stipulation by way of penalty' for the purposes of s 75 of the Contracts Act 1950.

**[90]** It was also contended by the defendants that the net tangible assets of the company was not representative of the true value of the shares in the company, and that the true value of the company was to the tune of several hundred million ringgit, in support of which expert valuation reports were adduced. The short but complete answer to this argument is simply that it is not the role of this court to save the defendants from the bargain that they have struck, nor to re-write the terms of their contract.

## CONCLUSION

**[91]** For the reasons explained in this judgment, the plaintiffs' claim was allowed with costs, and the defendants' counterclaim dismissed. I awarded general damages in favour of the plaintiff, which damages were to be assessed by the court.

A *Plaintiffs' claim allowed with cost; defendants' counterclaim dismissed.*

Reported by Dzulqarnain Ab Fatar

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